

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FILED
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ZONEPERFECT NUTRITION COMPANY

Plaintiff,

v.

HERSHEY FOODS CORPORATION,
HERSHEY CHOCOLATE &
CONFECTIONERY CORPORATION, and
BARRY D. SEARS,

Defendants.

U.S. DISTRICT COURT
DISTRICT OF MASS.

CIVIL ACTION
NO. 04-10760-REK

UNOPPOSED MOTION TO AMEND COMPLAINT

Plaintiff ZonePerfect Nutrition Company ("ZonePerfect") hereby moves unopposed, pursuant to Fed. R. Civ. P. 15(a), for leave to amend their complaint to add limited information and join Zone Labs, Inc. ("Zone Labs") as a party defendant, on the following grounds:

1. Counsel for defendants Hershey Foods Corporation and Hershey Chocolate and Confectionery Corporation (collectively "Hershey") and defendant Barry D. Sears ("Sears") have stated that they does not oppose the instant motion to amend.

2. Under Fed. R. Civ. P. 15(a), leave to amend is to be freely granted. Leave to amend should be granted *absent* reasons "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the

amendment, futility of amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Glassman v. Computervision Corp.*, 90 F.3d 617, 622 (1st Cir. 1996)(“Unless there appears to be an adequate reason for the denial of leave to amend (e.g., undue delay, bad faith, dilatory motive, futility of amendment, prejudice), we will not affirm it.”).

3. None of the grounds for opposing ZonePerfect’s motion to amend exist in this case. There has been no undue delay or bad faith as the facts relating to Zone Labs’ connection with allegations raised in ZonePerfect’s Complaint were recognized by ZonePerfect only after the Complaint was filed.

4. Joining Zone Labs as a party defendant is warranted by the facts as alleged in the Complaint and proposed First Amended Complaint (attached hereto) and are therefore not futile. Further, neither Zone Labs nor any other defendant will be prejudiced as this matter is in its early stages, and the proposed First Amended Complaint does not seek to alter the substance of any allegation and/or count raised in the Complaint.

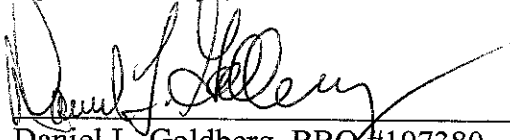
WHEREFORE, Plaintiff respectfully requests leave to amend their Complaint in the form of the First Amended Complaint attached hereto as *Exhibit 1*.

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Respectfully submitted,

ZONEPERFECT NUTRITION COMPANY

By its attorneys,



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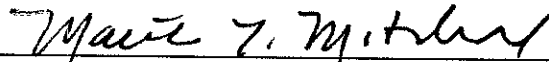
Boston, MA 02110

(617) 951-8000

Dated: May 26, 2004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon counsel for each defendant via facsimile and by hand to Ms. Arrowood and Mr. Adio and by mail to Mr. Smart this 26th day of May, 2004.



Mathew L. Mitchell